FILE COPY

FILED
MAY 13 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 54

GEORGE EVERETT LEGG,

Petitioner,

vs.

E. ST. JOHN, TRUSTEE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

HENRY ROBERTS,
J. K. BROWN,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	1
Reasons relied on for the allowance of the writ	3
Brief in support of petition for writ of certiorari	9
Opinions of the courts below	9
Jurisdiction	9
Statement of the case	10
Description of policy	10
Description of supplementary contract	11
Specification of errors	14
Summary of argument	14
Authorities and argument:	
Point I. The policy and supplementary contract	15
Point II. Exempt under sect. 70a of bankruptcy act	18
Point III. Exempt as life insurance under Tennessee statute	21
A. History of legislation and decisions	21
B. History of disability insurance and ruling of Tennessee Commissioner of Insurance	25
Point IV. Exempt as annuity contract under Tennessee statute	28
Point V. Title to policy and supplementary contract remains in bankrupt	33
Conclusion	38

Authorities Cited.

Cases:	
Anderson v. Hammond, 2 Lea (Tenn.) 281	30
Baranovitch v. Tony Horwatt, etc., 173 Atlantic 676 (Penn. Sup.) 7	6
Burlingham v. Crouse, 228 U. S. 459, 57 L. Ed. 920, 924	18
Dawson v. National Life, 156 Tenn. 306, 300 S. W. 567	22
Fidelity Investment v. Emerson, 318 Ill. 548, 149 N. E. 530	32
Hiscock v. Mertens, 205 U. S. 212, 51 L. Ed. 771	18
Holden v. Stratton, 198 U. S. 202, 49 L. Ed. 1018	18
Horwitz, In re., 3 Fed. Supp. 16	32
Morgan v. Pope, 7 Cold. (Tenn.) 541	30, 37
Mutual Life Ins. Co. v. Jeremiah Smith, Trustee, 33 L. R. A. (NS) 439, at 442	35
Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. Ed. 1061	21
Logan v. Fidelity, etc., 146 Mo. 115, 47 S. W. 948	25
Lunsford v. Nashville S. L. Corp., 162 Tenn. 179, 35 S. W. (2) 395	23
Provident Life & Accident v. Rimmer, 157 Tenn. 597	24

Page

Stanzell, In re., 8 F. (2d) 363 22
United States v. Hill, 120 U. S. 169, 30 L. Ed. 627, 632 28
Zimmer v. Central Accident Ins. Co., 207 Pa. 472, 56 Atlantic 1003 .. 25

STATUTES.

Rule 38, Supreme Court 9
Bankruptcy Act, Sec. 70a 2, 3, 4, 5, 7, 10, 13, 14, 18, 20, 34
Title 11, U. S. C. A., Sec. 110(a)(5) 18
Title 28, U. S. C. A., Sec. 347(a) 9
Tennessee Code of 1932, Secs. 8456 and 8458 ..... 2, 3, 10, 13, 21, 22, 28, 36
Tennessee Code, Sec. 7711 2

TREATISES.

3 C. J., page 199 30
Couch on Insurance, Vol. 1, Sec. 25 32
Outlines Fundamental Principles of Law, by Clark, p. 256 29

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 54

GEORGE EVERETT LEGG,

Petitioner,

vs.

E. ST. JOHN, TRUSTEE.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of George Everett Legg respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

On September 28, 1927, Metropolitan Life Insurance Company issued its "Income Policy, Whole Life, insuring the life of George E. Legg", with a supplementary contract attached thereto, and made a part thereof, and expressly providing that it could have no separate existence from the

policy, and providing for two disability benefits in the event of total and permanent disability of the insured, viz: (1) Waiver of premiums on policy and supplementary contract, (2) payment to insured, or to beneficiaries if insured became mentally incompetent, of monthly benefit payments.

Beatrice A. Legg, wife of insured, was the beneficiary, but on May 8, 1931, the four children of the insured were made the beneficiaries, three of these children now being infants in school.

On June 18, 1930, Legg had a nervous breakdown and became permanently and totally disabled under the terms of the policy, and in due course the benefits under the policy and supplementary contract were allowed by the Company and the premiums have been waived and the monthly payments made ever since, beginning as of June 18, 1930.

In March, 1934, a creditor attached the benefit payments in the State Court, and Legg filed a petition and was adjudicated a bankrupt on March 8, 1934. No benefit payments were then due or payable, same having been paid in advance on February 18, 1934, to March 18, 1934. The loan on the policy was then $1,476.91. This insurance policy was the sole asset of the bankrupt.

Legg asserted before the Referee, the District Court and the Circuit Court of Appeals, that the title to the policy, including the supplementary contract, and monthly disability benefit payments, did not pass to the Trustee for the creditors, and that same were exempt under the Bankruptcy Act, Sec. 70a, and under sections 8456 and 8458 of the Tennessee Code of 1932.

It was admitted that $40 per month of the disability benefit payments were exempt under sec. 7711 of the Tennessee Code, and that the cash surrender value of the policy was exempt under the Tennessee Code, but the Court held that the balance of the monthly disability benefit payments

of $134.52 were not exempt either under the Bankruptcy Act or under the Tennessee Code, and directed same to be paid to the Trustee for the benefit of the creditors.

This conclusion was reached by holding that the contract had no cash surrender value, and therefore did not fall within Sec. 70a of the Bankruptcy Act; and that it was not a life insurance policy, nor an annuity contract, and therefore did not fall within Sec. 8458 of the Tennessee Code of 1932.

B.

Reasons Relied On for the Allowance of the Writ.

1. It is claimed that the Supplementary Contract, based on and made a part of the policy, and, by its terms, having no existence or effect separated from the policy, is, in the broad sense used by the Congress, an "insurance policy".

2. The Federal courts classify "Annuity" contracts as life insurance policies, and, in any event, this is an "Annuity Contract", and as such within the classification "insurance policy", as used by Congress.

3. There has been some controversy as to whether Annuity Contracts constitute life insurance, and it is believed that the Tennessee Legislature, by Section 8458 of the Code of 1932, exempted both "The net amount payable under any policy of life insurance or under any annuity contract" in order to avoid any question about the matter, as the cash surrender value of insurance policies had been held exempt under the old statute, Section 8456, and that this is both a policy of life insurance and an annuity contract within the meaning of the Tennessee Statute.

4. The Supplementary Contract expressly provides that the company may deduct the interest due on the policy loan from the disability payments, thus making the disability contract a part of the policy, and the decision complained of

therefore disregards this provision of the contract between the insured and the Company. It also disregards the contract provision that the benefits are payable to the beneficiaries under the policy in event of mental incapacity of insured.

5. It is believed that the decision of the Court in holding that Legg could hold benefit No. 1 (i. e., waiver of premiums) while directing that benefit No. 2 (i. e., monthly disability payments) be taken away from him for the benefit of his creditors is not supported by the facts; by logic, or by law.

These two benefits are twin children, and they cannot be separated by holding that one is a legitimate child and belongs to Legg, and the other illegitimate and belongs to Legg's creditors. The opinion of the Circuit Court of Appeals attempts to answer this point by saying, near the end of the opinion, "This contention ignores the fact that each of the provisions is now being performed. The payment of premiums is waived, and the disability benefits are being paid." So, too, is the order of a Court condemning a man to be executed for murder, based on evidence of mistaken identity, performed when the man is executed, but that performance does not make the order right. On the contrary, the fact that an innocent man has been executed, even by order of Court, produces a shock.

6. This Court, in several cases, and particularly in *Burlingham* v. *Crouse,* cited and discussed in the supporting brief, has recognized and approved a long line of decisions holding that life insurance policies having no cash surrender value do not pass to the Trustee in Bankruptcy. The Congress also recognized and approved this line of decisions when it added the proviso about insurance to Section 70a of the Bankruptcy Act and thereby legislated negatively in reference thereto, while at the same time legislating posi-

tively relative to "insurance policies" having a cash surrender value. This Court has construed Section 70a of the Bankruptcy Act several times to mean that the Congress intended to give the insured a benefit by that Act. It is submitted that the decision complained of is in conflict with these decisions.

7. Finally, it is respectfully submitted that this is an opportune time for the Supreme Court to set its seal of approval upon the efforts of individual citizens to provide for their families and themselves, in the event of their death or disability, by carrying their own insurance for such protection.

8. Counsel for Petitioner have been so concerned about this decision that the matter has been presented to Mr. Geo. B. Eager, Jr., Professor of Insurance and Bankruptcy Law at the University of Virginia, and a recognized authority on these subjects, and we conclude by quoting him:

> "It seems to me that the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of Legg, Bankrupt, v. St. John, Trustee, is tragically wrong, both on principle and authority, in holding that the monthly payments to which a discharged bankrupt is entitled by reason of total disability, under an insurance policy which had no cash surrender value (if one accepts the court's view that the insurance against disability is severable from the life policy with which it was issued), belong to the trustee in bankruptcy.
>
> "It is common knowledge that many modern insurance policies, generically classed as 'life' policies, undertake to insure against other contingencies than that of death, and also to provide for installment instead of lump sum payments either in 'endowment' or 'non-endowment' policies. One of the most popular recent devices for selling 'life' policies has been the incorporation of clauses providing for the waiver of premiums and the payment of periodic benefits upon total

disability, and it seems to me socially unwise and legally unnecessary to hold that the presence of such a clause deprives the policy of its character as a 'life-policy,' within the meaning of that term as used in the exemption statutes. Though the disability contract, in the instant case, was called a 'Supplementary Contract', the evidences of intended integration are abundant.

"When the Tennessee legislature exempted 'the net amount payable under any policy of life insurance or under any annuity contract upon the life of any person, etc.', I think they meant to exempt the proceeds of any policy of the 'Quasi-investment' type, by which one attempts to build up, by present premiums, a future fund or income to which he and/or his dependents may look in case of old age, typified by the 'endowment' form, or death, or total disability, as contrasted with the pure 'indemnity' forms of insurance. Under the Tennessee statute, then, I think the Court should have held, as did the Pennsylvania Superior Court, under a similar statute, in *Baranovitch* v. *Horwatt* (July 13, 1934), 173 Atlantic 676, that 'the contract, in its broad terms, is a life insurance policy', and that the total disability benefits came within the exemption clause.

"Even if, however, one concedes the holding of the C. C A., that this so-called 'Whole Life' policy must be broken down into two contracts, and that the disability contract cannot be regarded either as a 'life' policy or as an 'annuity contract upon the life' of the bankrupt, it still seems to me that the segregated disability contract must be held to be an 'insurance policy' without any cash surrender value, within the meaning of Section 70a of the Bankruptcy Act. It is worthy of note that the Congress, in the insurance proviso, did not say 'life insurance policy' but only: 'When any bankrupt shall have any insurance policy which has a cash surrender value, etc.' Here, again, I think it a fair interpretation of the intention of Congress to say that it meant to save to the bankrupt,

upon payment to his trustee of the cash surrender value, if any, the benefit of 'any insurance policy' of the quasi-investment type by which one attempts to provide for his dependents, or himself, in the event of death, disability or old age. It is conceded that the disability insurance, in the instant case, as segregated from the life policy, had no cash surrender value, and it must be conceded that the Supreme Court of the United States has construed Section 70a of the Bankruptcy Act to mean that if, for any reason, an insurance policy has no cash surrender value, then it does not pass to the trustee in bankruptcy. The C. C. A. seems distinctly in error, then, in holding that Section 70a does not legislate, either positively or negatively, as to policies with no cash surrender value. Under the proviso, as construed, such policies simply remain the property of the bankrupt without the necessity of redemption."

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Sixth Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6906, in the matter of George Everett Legg, Bankrupt, George Everett Legg, Appellant, v. E. St. John, Trustee, Appellee, and that the judgment of the United States Circuit Court of Appeals, Sixth Circuit, may be reversed by this Honorable Court, and tnat your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

GEORGE EVERETT LEGG,
By HENRY ROBERTS,
J. K. BROWN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 54

GEORGE EVERETT LEGG,

Petitioner,

vs.

E. ST. JOHN, TRUSTEE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

This case was decided by the Circuit Court of Appeals, April 15th, 1935. The opinion is on page 22 of the Transcript of Record. Reported in 74 F. (2d) page —.

Opinion of District Judge, Record, page 12.

Opinion and Order of Referee, Record, page 7.

II.

Jurisdiction.

The jurisdiction of this Court is authorized and invoked under 28 U. S. C. A., section 347 (a) and under Rule 38, Section 5 (b), which provides:

> "Where a circuit court of appeals • • • has decided an important question of local law in a way prob-

ably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of Federal law which has not been, but should be, settled by this Court; or has decided a Federal question in a way probably in conflict with the decisions of this Court. * * *"

The question for decision is whether the title to monthly disability benefit payments, for total and permanent disability, under a contract supplementary to an insurance policy, and based thereon, pass to the Trustee in Bankruptcy of the insured Bankrupt, or are exempt under section 70a of the Bankruptcy Act, or under section 8458 of the Tennessee Code of 1932, and section 6 of the Bankruptcy Act; the Circuit Court of Appeals having held that the title passed, and that the benefit payments were not exempt under either the Bankruptcy Act or the Tennessee statute. These statutes are quoted hereinafter under Authorities and Argument.

III.

Statement of the Case.

The case has already been sufficiently stated under "Summary Statement of the Matter Involved" in the petition. A photostat copy of the insurance policy is exhibited with the record. For the convenience of the Court, the original policy accompanies the petition and brief with the request that it be returned when the Court disposes of the case.

Description of Policy.

Metropolitan Life Insurance Company, Income Policy, Whole life, insuring the life of George E. Legg, for immediate payment at death of $100 and 239 further monthly payments of $100 each. Annual Premium $425.83, payable dur-

ing life. Annual distribution of divisible surplus. Premiums for Supplementary Contracts: Disability provision $49.39 Ann. Accidental Death Provision $——. Receipt of $475.22, first premium, acknowledged Sept. 30, 1927. Policy dated Sept. 28, 1927. Amount of insurance or commuted value $17,452.00.

On first page, just before attesting clause: "The provisions and benefits printed or written by the Company on the following pages are a part of this Policy as fully as if recited over the signatures hereto affixed.

Cash surrender value at end of 6th year $1,585. The cash surrender value is payable to "the Owner hereof or the Assignee of record".

The policy was made payable to Beatrice A. Legg, wife of the insured, the right reserved to the insured to change the beneficiary. On May 8, 1931, the insured, in the manner provided, changed the beneficiary, and designated: John Paul, Goerge E., Mildred I. and Mary E. Legg, children of the insured, in equal shares, or to the survivors in equal shares, or to the Survivor, as Beneficiaries, reserving the right to change the Beneficiary.

Description of Supplementary Contract.

(Pasted Inside Policy on 2nd Page.)

"Total and Permanent Disability.

"Waiver of Premiums and Payment of Monthly Income.

"Supplementary Contract attached to and made a part of Life Insurance Policy No. 5081405-A issued on the life of George E. Legg,

Metropolitan Life Insurance Company

In consideration of the application for this Contract, as contained in the application for said Policy, the latter being

the basis for the issuance hereof, and in consideration of forty nine dollars and thirty nine cents, payable as an additional premium herefor, such payment being simultaneous with, and under the same conditions as, the regular premium under the said policy, except as hereinafter provided."

"Herewith agrees, that upon" due proof that the insured has, "*while said Policy and this Supplementary Contract are in full force,*" become totally and permanently disabled, and that such disability has continued uninterruptedly for at least three months, it will, "during the continuance of such disability"

> "1. Waive the payment of each premium falling due under said policy and this Supplementary Contract, and,
>
> "2. Pay to the insured, or a person designated by him for the purpose, or if such disability is due to, or is accompanied by, mental incapacity, to the beneficiary of record under said Policy a monthly income of $10 for each $1,000 of insurance, or of commuted value of instalments, if any, under said policy."

"The disability benefit herein provided shall not be payable if, at the date of disability, the said Policy shall be in force by virtue of any non-forfeiture provisions thereof."

"Insured to furnish proof of continued disability at any time demanded during first two years of disability, *and once each subsequent year.*

"The waiver of premiums and monthly income payments herein provided shall be in addition to all other benefits under said Policy," provided, however, that *interest on any indebtedness on the policy shall be deducted from monthly income payments,* if not otherwise paid. Monthly income payments shall not be subject to commutation.

"This Supplementary Contract shall automatically terminate and be of no further force or effect if any premium on said policy, or on this Supplementary Contract, shall remain unpaid at the end of grace allowed under said Policy for payment of premium thereunder *or if said Policy be surrendered* or converted under one of its non-forfeiture provisions or otherwise terminated."

"*This Supplementary Contract shall be deemed to be a part of the above number Policy* and the provisions of said Policy concerning declarations and representations by the insured, restrictions, payment of premiums, change of beneficiary, and assignment, are hereby referred to and by such reference made a part hereof."

"The provisions of said Policy as to reinstatement shall apply hereto, except that this Supplementary Contract shall not be reinstated unless said Policy is in force and no premium is in default thereof, or unless said Policy is reinstated at the time of reinstatement of this Supplementary Contract."

Dated Sept. 28, 1927.

The disability part of the Policy has no cash surrender value, and no value whatever except as a part of and based on the insurance policy.

Petitioner asserted before the Referee, District Judge and Circuit Court of Appeals, that the policy, its cash surrender value, and the supplementary contract, and the disability payments thereunder payable after adjudication, did not pass to the Trustee, and were exempt under Section 70a of the Bankruptcy Act, and Section 8458 of the Tennessee Code of 1932. The Court held that the disability benefits were not exempt, and directed that they be paid to the Trustee.

IV.

Specification of Errors.

The Circuit Court of Appeals erred in holding:

1. That the monthly disability benefit payments, under said supplementary contract, based on said insurance policy, payable after adjudication in bankruptcy, were not exempt under Section 70a of the Bankruptcy Act.

2. That said monthly disability benefit payments were not exempt under Sections 8456 and 8458 of the Tennessee Code of 1932.

3. That the title to said monthly disability benefit payments, payable after adjudication, passed to the Trustee, and in directing that same be paid to the Trustee in Bankruptcy.

V.

Summary of Argument.

The "Reasons Relied on for the Allowance of the Writ," set out in the foregoing petition, give a summary of the argument, and it seems superfluous to repeat them here.

We shall first discuss the terms and provisions of the policy, and supplementary contract, in the light of the common usage of the term life insurance, and then apply Section 70a of the Bankruptcy Act, and the pertinent decisions of this Court to the facts. We shall then undertake to show that the disability benefit payments are exempt under Section 8458 of the Tennessee Code both as "net amount payable under any policy of life insurance" and "or under any annuity contract", and therefore exempt under Section 6 of the Bankruptcy Act.

The discussion will be concluded under "The Title to the Policy and Supplementary Contract", which will summarize the entire argument.

VI.

AUTHORITIES AND ARGUMENT.

Point 1.

The Policy and Supplementary Contract.

The policy provides for Company loans on the policy to the insured. The Supplementary Contract provides that "interest on any indebtedness on the policy shall be deducted from the monthly income payments", if not otherwise paid. The decision disregards this contract provision.

The supplementary contract also provides that in the event of the "mental incapacity" of the insured, the monthly disability payments are to be made to the beneficiary of record, that is, the four children of Legg, thus further tieing the contract to the policy.

Neither the company nor the children are parties to the suit.

The quotations under Statement of the Case from the policy and Supplementary Contract show in express terms that the parties intended the insurance policy and Supplementary Contract providing for disability benefits to be one policy of life insurance.

The description of the policy earmarks it as "Income Policy, Whole Life", the "Whole Life" obviously referring to the disability benefits during life and during total and permanent disability, as well as to the payments to be made after the death of the insured.

The application shows that Legg was applying for what is commonly known as life insurance. In answer to Q. 15, Part A of the Application for Policy, the Applicant stated that the "Plan of insurance designated in the Rate Book" applied for was "Whole Life with Disability".

The "Total and Permanent Disability" part of the contract provides for:

1. Waiver of premiums on policy and contract.

2. Monthly disability payments to insured, or if he be mentally incapacitated, to beneficiaries under the policy.

Benefit No. 1 is worth about $475 per year. Benefit No. 2 is worth about $2,100 per year, less the $40 per month, or say $1,600 per year. Both benefits are provided by the Supplementary Contract, based on and made a part of the policy. They cannot be separated and Legg given the benefit of one and denied the benefit of the other. No. 1 is as much an asset of the estate as is No. 2. Benefit No. 1 keeps the policy and Supplementary Contract alive, while Benefit No. 2 was intended to keep the family alive during the disabled life of the insured. If the decision is right in giving benefit No. 2 to the creditors, then it is wrong in allowing Legg to hold title to Benefit No. 1, and Legg—totally disabled and bankrupt—should be required to pay to the Trustee the $475.22 per year, so long as he continues totally and permanently disabled, and bankrupt.

If this is the law of the land, not only Legg, but the millions of other citizens who are carrying similar insurance for the protection of themselves and their families have a right to know it. If it is not the law of the land, they should be encouraged by the decision of the Supreme Court to provide such protection.

The main consideration and condition upon which the disability payments are made after bankruptcy is the continued life of the policy and the disability of the bankrupt. The effect of the decision complained of is to treat this disability as an asset and purchase with it the disability benefits for the creditors, but it is not such a cash asset as the Bankruptcy Act contemplates shall pass to the Trustee. It

may be compared to the ordinary bankrupt's *ability* to earn a salary by performing services after bankruptcy; such salary is not an asset of the estate. The Act contemplates that the bankrupt shall give up all his cash assets to his creditors, and then begin life over with such ability as he may have. Surely the bankrupt with total and permanent disability will not be placed on a worse basis than one not disabled and whose ability to earn a living for his family is unimpaired.

It is asserted that when the title to the policy, and its cash surrender value, is held to continue in Legg, and to be exempt to him, such decision logically carries with it the right to "continue to hold, own and carry such policy free from the claims of the creditors" as stated in section 70a of the Bankruptcy Act. When Legg is given the title to the policy and the right to carry it or cash it in, he is given every right and privilege provided by the policy. He can surrender it for its cash surrender value, and cancel it, and the Court would be helpless to enforce its order, because the disability benefit payments are made only so long as the policy is in force.

The policy provides for monthly disability payments, in event of disability, before death, and for 240 monthly payments of $100 each after death of the insured. It is therefore obviously an Annuity Contract, and as such is within both the Federal and State classification of life insurance, as both classify annuity contracts as life insurance, and Tennessee goes further and provides that it is exempt if either a life insurance policy or an annuity contract. To the layman, and to the Legislature and Congress, it is protection for the insured and his family under the general classification of life insurance.

Point II.

Exempt under Section 70a of the Bankruptcy Act.

Section 70a of the Bankruptcy Act, now Section 110 (a) (5) U. S. C. A., provides:

"The Trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except insofar as it is to property which is exempt, to all

(5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. When any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the Trustee by the company issuing the same, pay or secure to the Trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the Trustee as assets;"

It is believed that the interpretation of this section by the Supreme Court, and the principles enunciated in its decisions in the following cases are decisive of the instant case:

Burlingham v. *Crouse,* 228 U. S. 459, 57 L. Ed. 920, 924;

Hiscock v. *Mertens,* 205 U. S. 212, 51 L. Ed. 771;

Holden v. *Statton,* 198 U. S. 202, 49 L. Ed. 1018.

The above language in reference to insurance policies was first inserted in the Bankruptcy Act as a proviso. By a later amendment it was incorporated as a part of the body of the Act. It is important to note also that it refers to "any insurance policy," and not to "any life insurance policy". This omission was doubtless, among other reasons, to make the statute comprehensive, so as to embrace every type and character of insurance such as annuity, endowment, tontine, ordinary, disability and every other class of insurance policies.

It is important to observe that the insurance policy in question had a cash surrender value, but the supplementary contract, as such, had no cash surrender value.

The Referee held that the right to these monthly disability payments were vested when Legg was adjudicated a bankrupt, and that under the first three lines of subsection 5 quoted above, viz: "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him", the title to the disability benefits passed to the trustee.

Legg claimed that the title did not pass, and that the benefits were exempt, because the supplementary contract was based on and made a part of the policy, which had a cash surrender value, and which cash surrender value was exempt under the Tennessee Statute, but that, if considered as a separate contract from the policy, it was necessarily based on same, and that if it had no cash surrender value, it was exempt for that reason, both under the Bankruptcy Act and the State Statutes. Also, that if it be assumed that it was vested right, then it was obviously an annuity, and as such exempt under both the Bankruptcy Act and the State Statutes.

Now then, in the three cases cited above, the Supreme Court had stated and repeated this (italics ours):

> "As Sec. 70a deals only with property which, *not being exempt, passes to the trustee,* the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule which, where such policies passed to the Trustee *because they were not exempt,* if they had a surrender value their future operation could be preserved by vesting the bankrupt with the privilege of paying such cash surrender value, *whereby the policy would be withdrawn out of the category of an asset of the estate.*
>
> "This is to say, *the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a non-exempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate.*"

In *Hiscock* v. *Mertens* the Court stated "it was an actual benefit for which the statute provided".

In *Burlingham* v. *Crouse,* the Court pointed out the fact that under the Bankruptcy Act of 1867, in which no special provision had been made for insurance policies, it had been held that insurance upon the life of the bankrupt vested in the bankrupt estate only to the extent of its cash surrender value at the time of filing the petition, hence when Congress enacted the Bankruptcy Act of 1898, it had this line of decisions in mind, and in order further to protect the bankrupt having insurance, inserted the proviso in Section 70a. So that both the Congress and the Supreme Court have recognized and approved the line of decisions holding that where the policy has no cash surrender value, the insured continues to hold it.

As stated by the Court in the last line above quoted, it was the purpose of Congress "not to cause such a policy when exempt to become an asset of the estate."

Therefore, whether considered as with or without a cash surrender value, the policy and the supplementary contract, or the supplementary contract based on and made a part of the policy, is an "insurance policy" in the sense intended by Congress, and is exempt in either event.

The cash surrender value being exempt under the Tennessee statute, in *Lockwood* v. *Exchange Bank,* 190 U. S. 294, 47 Law Ed. 1061, in considering what are now Sections 24 and 110 (a) of the Bankruptcy Law, the Court said: "The two provisions of the statute must be construed together and both given effect."

It is believed that the decision of this Court in the case of *Local Loan Co.* v. *Hunt* (decided April 30, 1934), 78 L. Ed. 1230, 93 A. L. R. 195, is applicable, particularly in that it emphasizes the point that the primary purpose of the act was to relieve the debtor "who surrenders for distribution the property which he owns *at the time of bankruptcy.*"

These disability benefits were not owned "at the time of bankruptcy", but are payable because of the *disability of the bankrupt after bankruptcy,* and because of the continued life of the insurance policy.

Point III.

Exempt as Life Insurance under Tennessee Statute.

A. History of Legislation and Decisions.

The old Statute passed in 1845-46, now section 8456 of the Tennessee Code of 1932, is as follows:

> "8456 4231 (2478). Insurance on Husband's Life, Effected by Himself, Goes to Wife and Children.—Any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and children; and the money thence arising

shall be divided between them according to the statutes of distribution, without being in any manner subject to the debts of the husband. (1845-46, ch. 216, sec. 3.)"

The new Statute Section 8458 of the Tennessee Code of 1932, passed in 1925, follows:

> "8458. Life Insurance or Annuity for or Assigned the Wife or Children, or Dependent Relatives is Exempt from Claims of Creditors.—The net amount payable under any policy of life insurance or under any annuity contract upon the life of any person made for the benefit of, or assigned to, the wife and/or children, or dependent relatives of such person, shall be exempt from all claims of the creditors of such person arising out of or based upon any obligation created after the effective date of this Code, whether or not the right to change the named beneficiary is reserved by or permitted to such persons. (1925, ch. 113, modified.)

It is asserted that the disability benefit payments in controversy are a part of "the net amount payable under the policy of life insurance", and as such are exempt under the new Section 8458 of the Code.

It is submitted that the history of the legislation and decisions in Tennessee conclusively demonstrate this proposition.

It was held by the United States District Court for the Western District of Tennessee in *In re Stansell,* 8 F. (2d) 363, that the old Statute 8456, providing that "any life insurance effected by a husband on his own life shall, *in case of his death,* inure to the benefit of his widow and children," exempted the proceeds of a life insurance policy from the creditors of the insured both *before* and *after* the death of the insured. The Supreme Court of Tennessee in the case of *Dawson* v. *National Life,* 156 Tenn. 306, 300, S. W. 567, held that the old Section 8456 exempted a life insurance policy and the cash surrender value thereof from the claims

of creditors of the insured before the death of the insured. While the Act of 1925, now Section 8458, was then in effect, the Court did not know it had been passed as was pointed out in *Lunsford* v. *Nashville S. L. Corp.*, 162 Tenn. 179, 35 S. W. (2) 395.

The courts have thus held that the old section exempted life insurance policies and the cash surrender value thereof, *the cash surrender value being payable to the insured,* during the lifetime of the insured, *a fortiori* the disability benefit payments under the life insurance policy, which appear on the face of the policy to have been provided for the children beneficiaries, are exempt under the new Section 8458. The legislature clearly intended to broaden the exemption statute relative to life insurance, and the same rule of construction applied by the courts to the old Statute applied to the new Statute will exempt these disability benefit payments. The reason for holding that the disability benefit payments are exempt under the new Statute are stronger than the reasons for holding that the cash surrender value of life insurance policies are exempt under the old Statute. The policy in question contemplates that the insured, while totally and permanently disabled, may be physically able to receive the payments and apply them to the support of his children, yet it provides that if he becomes "mentally incapable", the payments are to be made direct to the children beneficiaries.

The only case that we have found which we believe bears directly on this question is *Pauline Baranovich* v. *Tony Horwatt, &c.,* decided by the Pennsylvania Superior Court, Western District, July 13, 1934. — Pa. Superior Ct. —, 173 Atlantic 676. In that case the question decided was "Are moneys due to the insured under a clause contained in a group life insurance policy providing for the payment of

the face amount of the policy to the insured in the event of permanent disability subject to attachment at the instance of the insured's creditors?"

The Court held that the permanent disability benefits were exempt. While the policy considered was a Group Life Insurance Policy that fact does not affect the question. The Statute applied referred to Group Life Insurance and exempted the same, did not in terms refer to disability payments under Group Life Insurance Policies, yet the Court held that such disability payments payable under a Group Life Insurance Policy were exempt. The legislature had later passed an act expressly exempting disability payments, but the rights of the parties were determined under the old act and exemption was sustained.

We wish to emphasize in the instant case the point made by the Court in the Pennsylvania case, that the policy containing the provision for disability benefit payments is, "*in its broad terms, a life insurance policy.*"

Suppose this had been a life insurance policy payable to Legg's estate, with provision for double indemnity in case of accidental death, and he had met accidental death? If the decision complained of is right, then the Court would *separate* the proceeds of the policy and give the accidental half to the Trustee for the creditors, and give the other half to the widow and children, and thus definitely overrule every case ever decided under the old statute. This policy form provided for Accidental death indemnity, but Legg did not take same.

In *Provident Life and Accident Insurance Company* v. *Rimmer,* 157 Tenn. 597, it was held:

> "The mere addition of the double indemnity clause providing for increased insurance upon proof of death by accident did not divest the policy of its character of

insurance on life, or make the contract other than life insurance."

Zimmer v. *Central Accident Ins. Co.*, 207 Pa. 472, 56 Atlantic 1003.

Logan v. *Fidelity, etc.*, 146 Mo. 115, 47 S. W. 948.

B. History of Disability Insurance and Ruling of Tennessee Commissioner of Insurance.

Disability provisions in life insurance policies originated as provisions to protect the insured from lapse of his policy in case he became totally disabled. The original provision being for waiver of premium only. Then the provisions were extended to provide partial advance payment or accelerated payment of the policy amount. (i. e. the Pennsylvania case, *supra.*) Later came the further extension for a periodical payment in addition to the waiver of premiums, without diminution of the policy amoumt.

Such provisions are *included in life insurance policies* under statutory authority of many states. In New York, for example, the specific statutory authority is found in Section 107 (k) (2) of the Insurance Law.

Tennessee, so far as we observe, has no similar statute. Tennessee has standard provisions for life insurance policies, and *Section* 6182 *of the Tennessee Code* of 1932 provides that no policy of life insurance shall be issued until the form of same has been filed with the Insurance Commissioner, and not afterwards if the form is disapproved by the Commissioner.

The form of the policy and supplementary contract involved in this litigation was filed with the Insurance Commissioner and was not disapproved. *Consequently the insurance Commissioner has deemed such supplementary contract to constitute a part of the life insurance policy.* Moreover, under date of October 1st, 1929, the Insurance Commissioner of Tennessee mailed to the insurance com-

panies doing business in the state a letter prescribing standard provisions for "total and permanent disability benefits, *in connection with life policies.*" A copy of this letter is incorporated herewith. This letter from the Commissioner of Insurance shows that he considered the provisions for total and permanent disability benefits in connection with life policies *a part of the life insurance policies.*

State of Tennessee

Department of Insurance and Banking

Division of Insurance

Nashville

A. S. Caldwell, Commissioner; T. E. Miles, Deputy Commissioner; J. H. Washburn, Actuary.

October 1, 1929.

To the Company addressed:

Re: Standard Provisions for Total and Permanent Disability Benefits in Connection With Life Policies

Dear Sirs:

At a recent meeting of the National Convention of Insurance Commissioners in Toronto on September 19, 1929, the joint report of the two special committees, dated April 23, 1929, on the above subject, was adopted practically unanimously, and I wish to state that my views are in accord with this action.

The standard provisions for total and permanent disability benefits in connection with life policies, as approved by the National Convention of Insurance Commissioners, are shown in the attached exhibits.

This is to advise that this Department's approval of all total and permanent disability provisions in connection

with life policies is hereby withdrawn as of March 31, 1930. Total and permanent disability provisions in connection with life policies will not be approved for use in this State on or after April 1, 1930, unless they comply in substance with the requirements set forth in the attached exhibit. Each company should put the standard disability provisions into effect at as much earlier a date as possible.

In adopting the joint report of the special committees, the National Convention of Insurance Commissioners also adopted the following resolution:

> "In Connection with the proposed standard provisions we believe that an adequate reserve basis graded according to the waiting period, should be made compulsory."

Having offered this amendment my views are, therefore, fully in accord with the statement by the Commissioners to the effect that an adequate reserve basis should be prescribed for total and permanent disability benefits.

Would thank you to kindly acknowledge receipt of this letter.

Yours very truly,

(Signed) A. S. CALDWELL,
Commissioner.

ASC:BH.

We find no authority in the Tennessee statutes for the prescription by the Insurance Commissioner of such standard provisions relating to disability, except the authority to approve or disapprove forms of *life insurance policies,* found in Section 6182 of the Code, hence, the letter incorporated herewith from the Insurance Commissioner was based upon his authority to approve or disapprove the forms of *life insurance policies, and he considered the disability provisions a part of life insurance policies.*

This Court held in *United States* v. *Hill,* 120 U. S. 169, 30 L. Ed. 627, at 632, that the principle that the construction given a statute by the executive and administrative officers is entitled to great weight.

The importance of considering the question from a broad standpoint is emphasized by the facts in the Pennsylvania case cited. In that case the policy provided that the Company might accelerate or anticipate the payment of the face of the policy in full settlement of both disability payments and the face of the policy.

Suppose that in the instant case the policy had provided that in the event of Legg's total and permanent disability, the Company might elect to pay the face of the policy in settlement of all obligations thereunder. The policy and money would clearly be exempt as life insurance under the Tennessee Statute.

POINT IV.

Exempt as an Annuity Contract under Tennessee Statute.

It is believed that the Supplementary Contract, based on and made a part of the policy, is an Annuity Contract, and that the disability benefit payments are exempt as such under Section 8458 of the Tennessee Code of 1932.

Referring to the Metropolitan rate book for 1930, Edition June, 1932, pages 20-21, under the title "Total and Permanent Disability Provision", the disability rider is set out and the basis on which this rider is issued in connection with life insurance policies designated, as "Ordinary", "Deferred Annuity", "Intermediate", "Ordinary and Intermediate", is explained. The classification of total and permanent disability payments as "Annuities" is shown by some of the statements which we quote:

> "*Deferred Annuities*—This disability benefit provides, in the case of male lives, that if *total and per-*

manent disability occurs before the beginning of deferred annuity payments, further premiums will be waived and the Company will pay a monthly income of $6.00 for each $10.00 of deferred annuity called for by the contract, such *disability annuity* being payable during disability up to the time the deferred annuity payments begin and no longer."

"*Intermediate*—The waiver of premium and monthly annuity provision may be issued with intermediate policies."

"*Ordinary and Intermediate*—* * * Limits for waiver of premium and monthly annuity provisions are:

"* * * In determining the total limit for the waiver of premium and monthly *annuity* provision as to any applicant,"

"* * * The premium for the waiver of premium and *Monthly annuity* benefit will be the same."

Then at the top of pages 313 to 413, describing more than one hundred policies issued, this statement appears repeatedly: "No disability annuity granted on $500.00 policies for male lives nor on policies under $2,000 for female lives."

At the top of pages 382 to 388 there appears a statement "No disability annuity granted with this policy."

These statements have reference to the general instructions referred to above on pages 20-21.

Coming now to the definition of annuities: Annuities guarantee a certain income payable monthly, quarterly, semi-annually, as long as the annuity contract provides.

"An annuity is the right of one person to receive a periodical sum of money from another by virtue of a voluntary obligation which that other has assumed."

Outlines for Review of the Fundamental Principal of Law, page 256, by William Lawrence Clark, published by the American Law Book Company, 1923.

Underwriters classify annuities as *single premium and annual premium.* Single premium annuities may be either immediate or deferred, while annual premium annuities are deferred.

In 3 C. J. p. 199, the definition and nature of annuities is given and their duration discussed.

We quote from page 200:

> "In its technical meaning, an annuity is defined as 'a stated sum, payable annually,' or as a yearly payment of a certain sum of money granted to another in fee, for life, or for years, and chargeable only on the person of the grantor.
>
> "The term is used in a broader sense as designating a fixed sum, granted or bequeathed payable periodically, but not necessarily annually subject to such specific limitations as to its duration as the grantor or donor may lawfully impose."

Relative to duration of annuities, we quote from page 205:

> "The duration of an annuity depends upon the construction of the instrument by which it is created. It may be perpetual, for life, or for a period of years, or subject to such specific limitations as to its duration as the grantor or donor may impose."

Citing:

Anderson v. *Hammond*, 2 Lea. (Tenn.) 281, 31 Am. Rep. 612.

Morgan v. *Pope*, 7 Cold. (Tenn.) 541.

From Page 206, Contingent Annuities:

> "The intention of the testator or donor, as expressed or clearly indicated, will often make the payment of an annuity dependent upon some event, or some act of the annuitant, and such intention will of course, govern, unless the restriction is contrary to law or public pol-

> icy. Similarly an annuity created on condition that it shall cease on the annuitant doing certain specified acts is forfeited by the doing of such acts. But the right to an annuity is not lost where the further performance of the condition by the annuitant becomes impossible."

Applying the foregoing to the contract and facts in the instant case, it is clear that the disability payments under the policy and supplementary contract is an annuity and that the contract is an "*annuity contract*", as described in the exemption statute.

It is to be noted that this entire policy is an *annuity policy* providing *monthly income payments* for twenty years after the death of the insured, as well as *monthly disability payments* during his continued disability during life.

Attention is called to the fact that the Metropolitan has been making these disability annuity payments since June 18, 1930; that the contract provides that the company may have Legg examined as often as desired during the first two years, and *thereafter only once a year*. The contract is designated as a "Total and permanent disability contract", and the provisions of the contract, as well as the requirements of the company, mean just what it says, viz.: That the insured must be totally and permanently disabled, as defined in the contract, before the company will begin to make the disability annuity payments. The payments are contingent upon the continued disability and the continued life of Legg, with the right to check up on the continuance of the disability once a year. Whether it be considered a contingent annuity, or an annuity for life, subject to the continued total and permanent disability of the annuitant, it is respectfully submitted that it is exempt under the Tennessee Statute.

Suppose this had been a deferred annuity policy, providing for the payment of monthly annuities beginning March 18, 1934, and continuing each month thereafter? In such

case, it is clear, under the above decision, that the cash surrender value of the policy being exempt, the bankrupt would be entitled to the payments. In the instant case, the adjudication was March 8, 1934, and the first payment was due March 18th. Is it not clear that the payments were exempt?

A study of the decisions indicates the reason the Legislature had for exempting "Annuity Contracts", as well as "Life Insurance Policies." There has been a division of opinion among the dicisions as to whether "Annuity Contracts" constitute "Life Insurance", hence the Legislature resolved the question by exempting both "Life Insurance Policies" and "Annuity Contracts."

In the case of *In re Horwitz,* 3 Fed. Sup. 16, "Annuity Contracts" were classed as life insurance, so were endowments.

Volume One of Couch on Insurance, Sec. 25, says:

> "The principal controversy over annuity insurance which is a contract to pay the insured or a named person or persons, a sum or sums periodically during life or for a certain period, has been whether such contracts constitute life insurance. If, however, in consideration of a series of payments running through a number of years, the payee agrees to pay at a fixed time a definite sum of money, the payment is one of an endowment; but if the *definite sum is payable in fixed installments at certain times or intervals, the contract is in the nature of an annuity contract.*"
>
> Citing *Fidelity Investment Association* v. *Emerson,* 318 Ill. 548, 149 N. E. 530, the first headnote of which is as follows:

"A contract whereby a person agrees to pay a definite sum in fixed installments at certain times in consideration of a series of payments running through a number of years as annuity, is valid and recognized by Laws

1907, p. 370, Sec. 6, as amended by Laws 1909, p. 265, prescribing conditions of life insurance policies and exempting annuities."

It is interesting to note that the Company titled the contract in the Illinois case as "Special Income Contract", and the Court held it to be an "Annuity Contract", whereas in the instant case the Metropolitan titled the instant contract as "Income Policy", "Whole Life", so that, whether it be classified as "a Policy of Life Insurance" or as an "Annuity Contract", it is manifest that the legislature intended to exempt such policies or contracts.

POINT V.

The title to the policy and supplementary contract remains in the bankrupt and does not vest in the trustee.

While this title expresses the conclusion of the other points discussed, it also covers the point as to what property passes to the Trustee. This Court has held that while life insurance is property, it is peculiar property, and that this Court and Congress have so recognized it. By the line of decisions construing the Bankruptcy Act of 1867 and the Bankruptcy Act of 1898, cited in *Burlingham* v. *Crouse,* it has been held by this Court that the title to life insurance policies, and the term is used in its broadest possible sense, having no cash surrender value, remains in the Bankrupt, and did not pass to the Trustee. This line of decisions applied the term life insurance to "annuities" and all classes of insurance, and the Congress recognized this as the law of the land when it added to the Act of 1898 the provision relative to insurance policies having a cash surrender value. In short, the Court had held, and Congress approved the decisions, that insurance policies having no cash surrender value *were not assets of the estate and did not*

pass to the Trustee. The cash surrender value of this policy being exempt under Tennessee statutes, the policy and supplementary contract were not assets of the estate, and the title thereto remained in the bankrupt.

This Court has not only repeatedly held this to be the law, but stated the principle in several different ways in *Burlingham* v. *Crouse,* one of which we quote:

> "We think it was the purpose of Congress to pass to the Trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset; otherwise to leave to the insured the benefit of his life insurance policy."

Coming now to the Bankruptcy Act, the Congress knew that all sorts of insurance was being written under the general designation of "life insurance." Congress knew that "Annuities" and "Endowments," which strictly speaking might better be called investments, were commonly classed as life insurance, and in order to avoid any discussion as to what was embraced in the classification of "life insurance," Congress purposely omitted the word "life," and made the statute apply to "any insurance policy." This supplementary contract is certainly an insurance policy, and as such the title thereto does not pass to the Trustee under the first part of subsection 5 of Section 70a.

Again quoting from *Burlingham* v. *Crouse,* the Court said:

> "As we have construed the statute, its purpose was to vest the surrender value in the trustee for the benefit of the creditors, *and not otherwise to limit the bankrupt in dealing with his policy.*"

Applying this language to the instant case, the cash surrender value being exempt under the Tennessee Statute, the purpose of the Bankruptcy Act was to leave the title to

the policy in Legg and not to limit him in dealing with his policy or with the disability payments under the policy.

It is thought the case of *Hiscock* v. *Mertens, supra,* in which the Supreme Court held that the insured was entitled to the profit of about $5,000.00 which accrued on his policy within six months is not only illustrative but direct authority for holding that the disability benefits follow the policy and that Legg is entitled to them in this case.

Referring to the Tennessee Statutes:

While the Referee based his decision upon the ground that the policy and supplementary contract were separable and were two contracts, and while we think that by their terms and by following the separation of the policy and contract to the logical conclusion of such separation, it is clear that they are inseparable, yet we do not consider this point decisive of the case.

In the first place, there is a contingency, on the face of the supplementary contract as to the person to whom the disability payments are to be made. In the event of "mental incapacity" of the insured, the contract provides that these payments are to be made to the "beneficiary of record under said policy." It is believed that this alone is sufficient to prevent the absolute title and unlimited right to receive the disability payments, from vesting in the Trustee.

It was held in the case of *Mutual Life Ins. Co.* v. *Jeremiah Smith, Jr., Trustee,* 33 L. R. A. (N. S.) 439 at 442, that the rights of the life insurance company in a policy must be respected, and this supplementary contract states that it is "attached to and made a part of (the) life insurance policy," and it further provides that the supplementary contract cannot be carried except in connection with the main policy. Therefore by the terms thereof, the policy and contract are inseparable, and are one contract of insurance, and as such is exempt under the provision of Section

8458 of the Code of Tennessee, that "The net amount payable under any policy of insurance" shall be exempt.

The maxim that a Court will not ordinarily enter an order which it cannot enforce points to the logical conclusion that the disability benefits go with the policy. When the Court gives Legg the cash surrender value of the policy, it gives him the title to and control over the policy and the disability payments payable under the policy. Legg can take the cash surrender value and cancel the policy, and thereby stop the disability benefit payments, and nullify the order of the Court directing same to be paid to the Trustee. Therefore it is a contradiction to attempt to give to Legg the title to the policy and the cash surrender value thereof and yet say that his title is or can be limited by taking the benefits of the title away from him.

Whether it be treated as the net amount payable under a life insurance policy or under an annuity contract, section 8458 of the Code is decisive of the case in favor of Legg. Under the old statute, insurance policies payable to the insured husband, and the cash surrender value of such policies, were held to be exempt in favor of his widow and children from the claims of creditors of the husband, both *before* and *after* his death. Please observe that such policies were payable to the insured and not to the wife and childen who were made the beneficiaries by force of the statute.

Under the new statute, Section 8458 "The net amount payable under policy of life insurance or under any annuity contract upon the life of any person made for the benefit of, or assigned to, the wife and or children, or dependent relatives of such person shall be exempt from all claims of the creditors of such person." The requirements of this section are (1) that the life insurance policy or annuity contract must be upon the life of the debtor, and (2) made for the benefit of or assigned to the wife or children of the

insured. It does not say that the cash surrender value or the net amount payable under the policy or annuity contract *during the life of the insured* shall be payable to the beneficiaries in order to be exempt. On the other hand, like the old statute, it contemplates that during the life of the insured, he will collect "The net amount payable" and apply the same to the support of his wife and or children. Therefore the same construction the Courts have given the old statute applied to the new statute leaves no doubt about the proposition that the payments under the policy or contract, during the life of the insured, may be made to him, and that the same are exempt. In other words, the new statute exempts all payments, whether made to the insured or the beneficiaries, provided only that the policy or contract has been made for the benefit of or assigned to the wife or children.

The insurance policy in this case expressly made such provision by stating that the cash surrender value is to be paid to the insured and that the disability payments are to be paid to the insured, but in the event of his mental incapacity, the disability benefit payments are to be paid to the beneficiaries. In other words, even though disabled physically, the money is paid to the insured to use in supporting the beneficiaries, unless he becomes mentally incapable, in which event he is not allowed to handle the money, either under the policy or under the laws of the land.

Notwithstanding the opinion of the Circuit Court of Appeals that this contract is not an annuity, it is confidently submitted that it is an annuity both in the sense intended by the Legislature, and as defined by the Courts, and especially by the Tennessee Court in *Morgan* v. *Pope,* 7 Cold. (Tenn.) 541, from which we quote:

> "The duration of an annuity depends upon the construction of the instrument by which it is created. It

may be perpetual, for life, or for a period of years, or subject to such specific limitations as to its duration as the grantor or donor may impose."

The law could not have been better stated to fit the facts of this case if the court had had the facts before it when stating the law in 1867.

It is respectfully submitted that the disability benefit payments follow the title to the policy in the hands of the bankrupt both under the Bankruptcy Act and the Tennessee Statute.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the Petitioner's rights under the statutes, laws and Constitution of the United States may be preserved to him, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals, Sixth Circuit, and finally reverse it.

HENRY ROBERTS,
J. K. BROWN,
Counsel for Petitioner.